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WITH this number the VIRGINIA LAW REGISTER begins its fifth volume. It has learned to expect many kindnesses and much indulgence from the members of the Virginia bar, during the four years of its existence. It will continue confidently to count upon these favors. It ventures to hope that, in return, it may be able to serve the profession better as its years increase. The journal has a larger subscription list than at any time since its establishment, and begins the new volume with a courage and a confidence hitherto unfelt.

THE distinction made in the case of *Dawes* v. *New York etc. R. Co.*, published in full elsewhere, between the technical significance of the terms "action" and "suit," is observed throughout the Code of 1887.

The distinction is sharply contrasted in sections 3214 and 3215. In the former it is provided that "Any *action at law* or *suit in equity* . . . may be brought (1) In any county or corporation wherein any of the defendants may reside. (2) If a corporation be defendant, wherein its principal office is, . . . or its chief officer resides," etc., with a number of additional sub-sections.

Section 3215 provides that "An *action* may be brought in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein."

It seems clear enough that the latter section is applicable only to plenary actions at law, and not to suits in equity. The same distinction is observed in the references to this section in section 3220.

THE case of *Wagner* v. *County Commissioners of Frederick County*, recently before the United States Circuit Court of Appeals, 4th Circuit, at Richmond (91 Fed. 969), is one of the most remarkable in the annals of jurisprudence.

The plaintiff's claim was based upon 11,000 judgments, each for

precisely the same amount, viz., $100 and $1.30 costs, and each alleged to have been recorded on the same day against the same defendants as county commissioners.

The transcript of the alleged record of each judgment occupied five pages of the printed record on appeal, making, in the language of Goff, J., who delivered the opinion, "55,000 pages, or seventy-five volumes of over 730 pages each of these judgments and certificates. The judgments alone, with the certificate of the justice attached thereto, would make fifteen of such printed volumes."

There was no legal proof of the genuineness of the record of the judgments, and the judgment of the lower court in favor of the defendant was affirmed.

The remarkable nature of the case, aided by the still more remarkable pleading and documents filed, suggests the work of an escaped lunatic.

THE case of *Keyes* v. *Konkel*, 78 N. W. 649, recently decided by the Supreme court of Michigan, involved the novel question whether a dead human body was a personal chattel, recoverable in replevin. The plaintiff's brother died at a hospital, and, by request of the hospital authorities, the body was taken in charge by the defendants, who were undertakers. After the defendants had performed some services in preparing the body for burial, the plaintiff demanded possession. Defendants refused to deliver unless their charges were paid, and the gruesome spectacle was presented of the dead body held for charges.

In an action of replevin instituted to recover the body, the court held that the action would not lie, under the statute authorizing such an action for the recovery of "personal goods and chattels," and providing that where the plaintiff fails in his case, for a return of the property or its value. "It is apparent," says the court, "that no return of the property can be ordered in case of the replevin of a dead body, and it is equally true that its value in money can neither be appraised nor ascertained by a jury." The plaintiff seems, however, to have accomplished his purpose by his action, since he got possession by replevy, and the court held that no return could be ordered. He also recovered his costs.

The court recognizes the American rule that there may be a quasi-property in a dead body for purpose of control and burial, and that damages may be recovered for its mutilation. But the recovery of damages in such case is based upon the infringement of the right of the

next of kin to have the control of the body for purposes of burial, in an unmutilated condition, rather than upon any notion of property therein.

The general subject is treated at large in monographic note 82 Am. Dec. 509–516; see also *Pierce* v. *Proprietors*, 10 R. I. 227 (14 Am. Rep. 667); *State* v. *Doepke*, 68 Mo. 208 (30 Am. Rep. 785); *Weld* v. *Walker*, 130 Mass. 422 (39 Am. Rep. 465 and note); *Griffith* v. *Charlotte etc. R. Co.*, 23 S. C. 25 (55 Am. Rep. 1); *Renihan* v. *Wright*, 125 Ind. 536 (21 Am. St. Rep. 249 and note); *Larson* v. *Chase*, 47 Minn. 307 (28 Am. St. Rep. 370 and note).

THE Supreme Court of the United States has just handed down (in *Kirby* v. *U. S.*, April 3, 1899) an important decision arising under the Sixth Amendment of the Constitution of the United States, declaring that "in all criminal prosecutions, the accused shall . . . . be confronted with the witnesses against him."

The defendant was indicted under 18 U. S. Stat. 479, chap. 144, for receiving stolen goods, the property of the United States. The statute provides that on a prosecution thereunder, proof of the previous conviction of the principal felon shall be conclusive proof against the receiver that the goods in question have been stolen from the United States. On the trial, the government offered the record of the conviction of the principal felons, without other proof that the goods were stolen, and the same was allowed over the objection of the prisoner.

On appeal, this was held to be error, and the provision of the statute quoted, was declared to be unconstitutional, as an infringement of the Sixth Amendment—Mr. Justice Harlan delivering the opinion.

The ruling of the court seems to be based on soundest constitutional principles. As said by Mr. Justice Harlan, the record of the conviction of the principal felons, while conclusively establishing their guilt, could not be used to establish against the prisoner, charged with another and substantial crime, a fact which was an essential element of the crime charged. If present at the previous trial, he would have had no standing in court, and no right to cross-examine the witnesses, nor to be heard by his own witnesses.

The case is one of first impression in the Supreme Court of the United States, and the precise question seems not to have been heretofore adjudicated by any court.

In *Mattox* v. *United States*, 146 U. S. 140, dying declarations were held to be admissible, but as they were offered as evidence in *behalf*

of the prisoner and not against him, the question whether the Sixth Amendment alters the common law rules as to the admissibility of such declarations, as evidence *against* the accused, was not raised.

On a subsequent appeal in the same case (156 U. S. 237) it was held that this Amendment has not changed the common rule that testimony of a witness, sworn and examined on a former trial of the same indictment, who has since died, may be read against the prisoner on a second trial.

The reasoning of the court in delivering the opinion in the latter appeal (156 U. S. 237, 243) would equally apply to dying declarations; the principle being laid down that the Constitution is to be interpreted not literally, but "in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta." And such is the generally accepted doctrine. Cooley, Const. Lim., 74–80, 388.